



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JOANNE HART and SANDRA )  
BUENO, on behalf of )  
themselves and all others )  
similarly situated, )  
Plaintiffs, )  
vs. ) No.1:15-CV-04804-WHP  
BHH, LLC d/b/a BELL + )  
HOWELL and VAN HAUSER, LLC, )  
Defendants. )

Videotaped Deposition of DR. PAUL W.  
BORTH, called for examination, taken pursuant  
to the Rules of the United States District Courts,  
pertaining to the taking of depositions, taken before  
Lynn A. McCauley, CSR No. 84-003268, RPR, a Certified  
Shorthand Reporter of the State of Illinois, at  
33 West Monroe Street, Suite 1100, Chicago, Illinois,  
on January 16, 2018, at 9:44 a.m.

Pages 1- 313

1 and roaches please? 09:49

2 A. That's common -- common nomenclature. 09:49

3 If it requires -- if the answer -- 09:49

4 my answer requires that I separate roaches and ants 09:49

5 from spiders, I'll say so. 09:49

6 Q. Okay. Thank you. 09:49

7 Are you providing any opinion as to 09:49

8 the efficacy of Bell + Howell ultrasonic pest 09:49

9 repellers in repelling and driving out rodents? 09:50

10 A. No. 09:50

11 Q. Are you an expert on rodents? 09:50

12 A. No. 09:50

13 Q. Are you an expert on consumer preference? 09:50

14 MR. OSTOJIC: Object to form, foundation. 09:50

15 But go ahead. 09:50

16 BY THE WITNESS: 09:50

17 A. No. 09:50

18 BY MR. KOPEL: 09:50

19 Q. Are you an expert on marketing? 09:50

20 A. I've not been employed as a marketer. 09:50

21 Q. So are you delivering any expert opinions 09:50

22 pertaining to the fields of consumer preference or 09:50

23 marketing in this case? 09:50

24 A. Yes, I am, and that goes to my previous 09:50

25 employment under -- or with Dow AgroSciences, the 09:50

1 various roles that I held. 09:50

2 Q. Okay. Can you please explain what 09:50  
3 opinions you're expressing regarding consumer 09:50  
4 preference and marketing? 09:50

5 A. They are contained in the report in 09:50  
6 various different ways. 09:50

7 The one that jumps out at me as most 09:51  
8 obvious is my opinion on Joanne Hart and Sandra 09:51  
9 Bueno's deposition and their use of the devices that 09:51  
10 are in question. 09:51

11 And then the other piece in the 09:51  
12 report that probably goes to your question is the 09:51  
13 section on -- that I pulled from Amazon reviews. 09:51

14 Q. So I know I asked you this before, but I 09:51  
15 wasn't entirely clear on the answer. 09:51

16 Are you an expert in marketing? 09:51

17 A. I have had many jobs within Dow 09:51  
18 AgroSciences that -- that required that I interact 09:51  
19 with marketers and marketing and the development of 09:51  
20 pesticides. 09:52

21 Was I ever hired as a marketer, 09:52  
22 which you could say would be the -- in the realm of 09:52  
23 an expert, I was never hired as an expert in 09:52  
24 marketing. 09:52

25 Q. Do -- 09:52

1           A.    I supplemented their work as a technical    09:52  
2    person.   09:52

3           Q.    Do you hold any degrees or certification    09:52  
4    in marketing?   09:52

5           A.    I'm sorry. I couldn't hear you.           09:52

6           Q.    Do you hold any degrees or certifications    09:52  
7    in marketing?   09:52

8           A.    No, I do not.                                   09:52

9           Q.    Have you ever taught any courses in        09:52  
10   marketing?    09:52

11          A.    No, I have not.                                09:52

12          Q.    Have you ever written any publications      09:52  
13   concerning marketing?                                        09:52

14          A.    I have written technical -- technical        09:52  
15   pieces that were contained in trade magazines, which      09:52  
16   could be considered marketing materials for pest --        09:52  
17   certain pesticides.    09:52

18          Q.    Can you please explain what you mean by      09:52  
19   that?    09:52

20          A.    Yeah.    09:52

21          Q.    Are you referring to product instructions    09:52  
22   or specifications?    09:52

23          A.    I am.    09:52

24                       Both product -- the -- the roles        09:52  
25   that I had in Dow AgroSciences required me over the        09:53

1 two consumers in reaching your conclusions? 10:29

2 MR. OSTOJIC: Object. Form, foundation, and 10:29  
3 mischaracterizes his testimony. 10:29

4 Go ahead. 10:29

5 BY THE WITNESS: 10:29

6 A. Anecdotal evidence is not something I 10:29  
7 would rely on 100 percent. In the -- but I would 10:29  
8 consider it as the part of the whole -- the whole 10:30  
9 data package, if you will, the whole total data 10:30  
10 package. 10:30

11 BY MR. KOPEL: 10:30

12 Q. Have you seen reliable evidence that the 10:30  
13 Bell + Howell ultrasonic pest repellers are capable 10:30  
14 of pest control in a residential environment? 10:30

15 MR. OSTOJIC: Object. Asked and answered. 10:30

16 But go ahead. 10:30

17 BY THE WITNESS: 10:30

18 A. That's a long -- that's a long question. 10:30  
19 Can you say it again? 10:30

20 MR. KOPEL: Can you please repeat the 10:30  
21 question? 10:30

22 (WHEREUPON, the record was 10:30  
23 read by the reporter.) 10:30

24 MR. OSTOJIC: Same objections. Asked and 10:30  
25 answered. 10:30

1 Go ahead. 10:30

2 BY THE WITNESS: 10:30

3 A. I guess I cannot ask you questions, 10:30

4 but -- 10:30

5 MR. KOPEL: You can ask for a clarification. 10:30

6 BY THE WITNESS: 10:31

7 A. Clarify reliable for me. 10:31

8 BY MR. KOPEL: 10:31

9 Q. Well, you just said that -- you -- I 10:31

10 believe what you just said -- I was using the word 10:31

11 reliable based on what you said, and -- what I 10:31

12 believe you said was that anecdotal evidence may be 10:31

13 considered as part of a whole package, but by itself 10:31

14 it's not really reliable, so I was using reliable in 10:31

15 the same context as you. 10:31

16 A. Okay. So the question again was, as I 10:31

17 remember it. Have I seen reliable evidence in a 10:31

18 consumer -- 10:31

19 MR. KOPEL: Do you want to read back. 10:31

20 THE WITNESS: Yeah. Sorry. 10:31

21 MR. KOPEL: I'll just ask the court reporter 10:31

22 to please read the question one more time. 10:31

23 THE WITNESS: Now that I understand reliable. 10:31

24 MR. KOPEL: That's fine. 10:31

25

1	(WHEREUPON, the record was	10:31
2	read by the reporter.)	10:31
3	MR. OSTOJIC: Same objections.	10:31
4	BY THE WITNESS:	10:32
5	A. No.	10:32
6	BY MR. KOPEL:	10:32
7	Q. Let's talk about driving pests out of the	10:32
8	home or out of the building.	10:32
9	Now, when -- in the context of the	10:32
10	Bell + Howell devices, we've got the claim: Drive	10:32
11	pests out; correct?	10:32
12	A. Yes.	10:32
13	Q. Okay. What do you interpret that to	10:32
14	mean?	10:32
15	A. I interpret that to mean that the device	10:32
16	will drive pests out of the range of their hearing or	10:32
17	being exposed to the device.	10:32
18	Q. So if pests are inside of -- or	10:32
19	underneath a floor, for instance, or in a crack in a	10:32
20	floor, would that be included?	10:32
21	MR. OSTOJIC: Object to form.	10:32
22	BY THE WITNESS:	10:32
23	A. Included in what?	10:32
24	MR. OSTOJIC: What?	10:32
25	MR. KOPEL: Sure. Let me take a step back.	10:32



1 BY MR. KOPEL: 10:33

2 Q. If pests in a crack in a floor or 10:33

3 underneath a floor, then the ultrasonic sound waves 10:33

4 would not be able to reach them; correct? 10:33

5 A. More than likely. 10:33

6 Q. Okay. So is -- so is that area included 10:33

7 under your definition of drives pests out? 10:33

8 MR. OSTOJIC: Object to form. 10:33

9 But go ahead. 10:33

10 BY THE WITNESS: 10:33

11 A. If it was to drive -- if the ultrasonic 10:33

12 repeller drove pests out of a room, let's say, to 10:33

13 some area where they could not hear or be exposed to 10:33

14 the ultrasonic sound, then the answer is yes; and if 10:33

15 that's behind walls, yes; if that's in cracks, yes; 10:33

16 if it's -- if they can't -- if they're not exposed to 10:33

17 the sound, they can't be repelled. 10:33

18 BY MR. KOPEL: 10:34

19 Q. Do you think it was -- it is unreasonable 10:34

20 for a consumer to understand drives pests out to mean 10:34

21 drives pests out of the house? 10:34

22 A. I do not. 10:34

23 Q. You think that is a reasonable 10:34

24 interpretation? 10:34

25 A. I sure do. 10:34

1 MR. OSTOJIC: Object to form, foundation. 10:34

2 Go ahead. 10:34

3 BY MR. KOPEL: 10:34

4 Q. Now, have you seen evidence that the 10:34

5 Bell + Howell ultrasonic pest repellers are capable 10:34

6 of driving pest out of a house? 10:34

7 MR. OSTOJIC: Object to form, foundation. 10:34

8 BY THE WITNESS: 10:34

9 A. No. 10:34

10 BY MR. KOPEL: 10:34

11 Q. Same question for a living space. 10:34

12 Have you seen evidence that the 10:34

13 Bell + Howell ultrasonic pest repellers are capable 10:34

14 of driving pests out of a living space? 10:34

15 A. It would be anecdotal evidence, but I go 10:35

16 back to the Hart and Bueno depositions and assert 10:35

17 that they -- the use of repeller could have been 10:35

18 responsible for what they experienced, what they saw, 10:35

19 the results. 10:35

20 Q. Have you seen reliable scientific 10:35

21 evidence that the Bell + Howell ultrasonic pest 10:35

22 repellers are capable of driving pests out of a 10:35

23 living space? 10:35

24 A. No. 10:35

25 Q. Have you seen evidence that the 10:35

1 ultrasonic pest repellers, the Bell + Howell 10:35

2 ultrasonic pest repellers are capable of being 10:35

3 effective beyond a period of nine days? 10:36

4 MR. OSTOJIC: Object to form. 10:36

5 Go ahead. 10:36

6 BY THE WITNESS: 10:36

7 A. I'm trying to remember the length of time 10:36

8 that the six tests that you referenced were 10:36

9 conducted. 10:36

10 BY MR. KOPEL: 10:36

11 Q. Now, this isn't -- it's not a memory 10:36

12 test, so if it helps you answer the question, I'm 10:36

13 happy to mark those as exhibits. 10:36

14 A. It would help. 10:36

15 Q. Okay. 10:36

16 A. Because I don't know if they were longer 10:36

17 than nine days or not. 10:36

18 Q. Perfectly understandable, so let's, 10:36

19 please -- the first thing I'm going to hand you is a 10:36

20 document that was previously marked as Exhibit 13. 10:36

21 MR. OSTOJIC: Is this 13 on -- 10:37

22 MR. KOPEL: Yes, this was marked as -- I 10:37

23 believe at Mr. Mishan's deposition. 10:37

24 THE WITNESS: Okay. So just to be clear, I'm 10:37

25 only looking at the inspect reports. 10:37

Page 49

1 MR. KOPEL: Sure. And I'm going to hand you 10:37  
2 three -- we're going to mark three additional 10:37  
3 exhibits. 10:37

4 While you're looking that over, I'll 10:37  
5 ask the court reporter to mark three documents. 10:38

6 The first one is Bates No. 10:38  
7 Feuerstein 74 through 85. 10:38

8 I'll ask the court reporter to 10:38  
9 please mark this as Exhibits Borth -- we're up to 3; 10:38  
10 right? 3. 10:38

11 (Whereupon, a certain 10:38  
12 document was marked Borth  
13 Exhibit 3 for  
14 identification.) 10:38

15 MR. KOPEL: The second document is Bates Nos. 10:38  
16 BHH LLC 1810 through 1815. 10:38

17 I'll ask the court reporter to mark 10:38  
18 that down at Borth Exhibit 4. 10:38

19 (Whereupon, a certain  
20 document was marked Borth  
21 Exhibit 4 for  
22 identification.) 10:38

23 MR. KOPEL: The third document bears Bates 10:38  
24 Nos. BHH LLC 712 through 717, and I'll ask the court 10:38  
25 reporter to please mark that as Borth Exhibit 5. 10:38

Page 50

1 (Whereupon, a certain 10:38  
2 document was marked Borth  
3 Exhibit 5 for  
4 identification.) 10:39  
5 MR. OSTOJIC: Would you go over Exhibits 3, 10:39  
6 4, and 5, the Bates stamp again. 10:39  
7 MR. KOPEL: Well, I'll just give them to you 10:39  
8 if that's okay. Or -- or -- do you have them, Rob? 10:39  
9 MR. OSTOJIC: Yeah, I have them. 10:39  
10 MR. KOPEL: Yeah, no problem. 10:39  
11 So Feuerstein 74 through 85 is Borth 10:39  
12 3. 10:39  
13 MR. OSTOJIC: Okay. 10:39  
14 MR. KOPEL: BHH LLC 1810 through 1815 is 4. 10:39  
15 MR. OSTOJIC: Uh-huh. 10:39  
16 MR. KOPEL: And BHH LLC 712 through 717 is 5. 10:39  
17 MR. OSTOJIC: Got it. Thank you. 10:39  
18 MR. KOPEL: I'm going to ask the court 10:41  
19 reporter to please repeat the question and then we'll 10:41  
20 wait for her to catch up with us and you'll give your 10:41  
21 answer, please. 10:41  
22 THE WITNESS: Okay. 10:42  
23 (WHEREUPON, the record was  
24 read by the reporter.)  
25 THE WITNESS: Okay. Could you repeat it one 10:45

1 more time, and then I've got an answer. 10:45

2 (WHEREUPON, the record was 10:45

3 read by the reporter.) 10:45

4 MR. OSTOJIC: Object to form. 10:45

5 Go ahead. 10:45

6 BY THE WITNESS: 10:45

7 A. I have not. 10:45

8 BY MR. KOPEL: 10:45

9 Q. Have you seen reliable evidence that the 10:45

10 Bell + Howell ultrasonic pest repellers are capable 10:45

11 of repelling pests in a carpeted room? 10:45

12 A. No. 10:46

13 Q. Have you seen reliable evidence that the 10:46

14 Bell + Howell ultrasonic pest repellers are capable 10:46

15 of repelling pests in a room with furniture in it? 10:46

16 MR. OSTOJIC: Object to form. 10:46

17 Go ahead. 10:46

18 BY THE WITNESS: 10:46

19 A. No. 10:46

20 BY MR. KOPEL: 10:46

21 Q. Have you seen reliable evidence that the 10:46

22 Bell + Howell ultrasonic pest repellers are capable 10:46

23 of repelling pests in a room with a bed in it? 10:46

24 A. No. 10:46

25 MR. KOPEL: I'll ask the court reporter to 10:47

1 BY THE WITNESS: 12:17

2 A. It could but not -- 12:17

3 BY MR. KOPEL: 12:17

4 Q. That wouldn't concern you in the context 12:17  
5 of a test? 12:17

6 MR. OSTOJIC: Object to form, foundation. 12:17

7 But go ahead. 12:17

8 BY THE WITNESS: 12:17

9 A. As I said, I would not have designed an 12:17  
10 experiment with -- and put spiders and roaches and 12:17  
11 ants in the chamber or the testing arena at the same 12:17  
12 time. 12:18

13 BY MR. KOPEL: 12:18

14 Q. Okay. Would you have put roaches and 12:18  
15 ants in the same arena at the same time if you had 12:18  
16 designed an experiment? 12:18

17 A. You know, let me -- let me qualify. 12:18

18 It really depends on the purpose of 12:18  
19 the experiment. 12:18

20 You could set out a hypothesis where 12:18  
21 the purpose of experiment being I want to find out 12:18  
22 what happens when ants and roaches are put in the 12:18  
23 chamber together. You'd have to do it that way in 12:18  
24 order to answer that question. 12:18

25 Q. Sure. 12:18

Page 111

1 BY MR. KOPEL: 12:21

2 Q. So in this test they tested the roaches 12:21

3 and ants in the same chamber at the same time; 12:21

4 correct?

5 A. Well, it appears so, but let me read the 12:22

6 protocol to make sure that I'm -- 12:22

7 Q. That's okay. If it's helpful you can 12:22

8 take a look at Page 3 -- 12:22

9 A. That would help. 12:22

10 Q. -- the second paragraph, the last 12:22

11 sentence of the second paragraph. 12:22

12 A. "In order to prevent spiders -- in order 12:22

13 to prevent spiders eat ants and roaches, the testing 12:22

14 will be conducted separately, spiders in one 12:22

15 testing" -- yes, you are right. 12:22

16 Q. Okay. Do you feel comfortable using the 12:22

17 data from the roaches and the ants portion of this 12:22

18 study in rendering an opinion on a home which might 12:22

19 only have ants or only have roaches? 12:22

20 A. Yes, I do. 12:22

21 Q. Why? 12:22

22 A. Because -- because I'm presented with 12:22

23 data that show a difference in -- in results when the 12:22

24 repeller is on or off. 12:23

25 Q. Now, do you agree that ants and roaches 12:23



1 can affect each other's movements? 12:23

2 A. They might. 12:23

3 Q. So let's say the ultrasonic technology 12:23

4 was only effective as to roaches or ants, but -- so 12:23

5 under those circumstances wouldn't it be possible 12:23

6 that as a secondary result the one that it is not 12:23

7 effective for would also exhibit movement? 12:23

8 MR. OSTOJIC: Object. Form, foundation, 12:23

9 incomplete hypothetical. 12:23

10 Go ahead. 12:23

11 BY THE WITNESS: 12:23

12 A. Could you repeat that long question? 12:23

13 MR. KOPEL: Sure. 12:23

14 BY MR. KOPEL:

15 Q. Let's say -- let's say that ultrasonic 12:23

16 technology were effective to affect the movement of 12:24

17 roaches and not ants, okay? 12:24

18 A. Okay. Hypothetical. 12:24

19 Q. Hypothetical, right. 12:24

20 Under those circumstances, if you 12:24

21 tested roaches and ants together in the same chamber, 12:24

22 even under this hypothetical where the technology is 12:24

23 not effective towards the ants, you still might see 12:24

24 some increased movement on the part of the ants due 12:24

25 to its effectiveness on the roaches; would that be 12:24

1 correct? 12:24

2 A. You might. 12:24

3 MR. OSTOJIC: Object to form, foundation. 12:24

4 Incomplete hypothetical. 12:24

5 But go ahead. 12:24

6 BY THE WITNESS: 12:24

7 A. You might. 12:24

8 BY MR. KOPEL: 12:24

9 Q. Okay. So does that concern you in terms 12:24

10 of extending the data from this test to a situation 12:24

11 where only roaches were present or only ants were 12:24

12 present? 12:24

13 A. Again, I say not really. 12:24

14 BY MR. KOPEL: 12:24

15 Q. What species were used in this test? 12:24

16 A. They do not say. 12:24

17 Q. Is it important to know what species 12:25

18 there are -- they use? 12:25

19 A. It would be helpful. 12:25

20 Q. Is it important? 12:25

21 MR. OSTOJIC: Object to asked and answered. 12:25

22 But go ahead. 12:25

23 BY THE WITNESS: 12:25

24 A. Not necessary in my opinion. 12:25

25

1 people talk about replications. 12:40

2 Q. Given that you don't know the species of 12:40  
3 tests used, would you be able to replicate this test 12:40  
4 if you wanted to? 12:41

5 MR. OSTOJIC: Object to form, foundation. 12:41

6 But go ahead. 12:41

7 BY THE WITNESS: 12:41

8 A. It would be -- it would be coincidence I 12:41  
9 guess. It would be -- I certainly can test roaches, 12:41  
10 I can test ants, and I can test spiders. 12:41

11 Whether they're exactly the same 12:41  
12 species, we don't know since they -- since they 12:41  
13 didn't say. 12:41

14 BY MR. KOPEL: 12:41

15 Q. Well, in common practice and when we talk 12:41  
16 about the scientific concept of replication, would be 12:41  
17 to use the same species; correct? 12:41

18 A. You would want to have anything 12:41  
19 identical, yes, replicates should be identical. 12:41

20 Q. Given that we don't know the model of 12:41  
21 pest repeller used here, would that also prevent you 12:41  
22 from replicating this test if you wanted to do so? 12:41

23 A. It depended on what level. 12:41

24 If you -- if you wanted to test a 12:41  
25 Bell + Howell ultrasonic repeller, and your question 12:41

1 A. Yes. 01:49

2 Q. Would it have been improper if they 01:49

3 hadn't done that? 01:49

4 MR. OSTOJIC: Object to form. 01:49

5 BY THE WITNESS: 01:49

6 A. Yeah, the word improper, it -- if they 01:49

7 set a rule in the beginning that says where they're 01:49

8 going to count something in a -- that's in a tunnel, 01:49

9 then you abide by the rule. 01:49

10 BY MR. KOPEL: 01:49

11 Q. Well, do you see the next sentence says, 01:49

12 "Add a new spider, ants, and roaches according to the 01:49

13 quantity of loss the next day." 01:49

14 Do you see that? 01:49

15 A. Yes. 01:49

16 Q. Was that a proper thing for them to do? 01:49

17 A. I would not have done that. 01:49

18 Q. Does that call the data that came from 01:49

19 the study into question? 01:49

20 MR. OSTOJIC: Object to form, but go ahead. 01:49

21 BY THE WITNESS: 01:49

22 A. I don't think seriously. 01:49

23 BY MR. KOPEL: 01:49

24 Q. Well, let's take a step back. 01:49

25 When they replaced them, which 01:49

1 chamber did they put them in? 01:49

2 A. I'd have to assume they put them in the 01:50

3 one where they were originally released, where they I 01:50

4 think originally released they said they split them 01:50

5 50/50, so more than likely they put them back in the 01:50

6 same way that they introduced the original 01:50

7 population. 01:50

8 Q. I -- I don't understand. 01:50

9 So, in other words, if you look at 01:50

10 Day 3, right, so it looks like they added three 01:50

11 roaches. Which chamber were the three roaches added 01:50

12 to? 01:50

13 A. Wait a minute. Okay. Day 3 under 01:50

14 testing, the third -- 01:50

15 Q. Test Result Day 3, there's a -- at the 01:50

16 bottom of the chart it says, "Quantity of loss." 01:50

17 Do you see that? 01:50

18 A. Yes. 01:50

19 Q. So it looks like they put in 3 new 01:50

20 roaches on Day 3; right? 01:50

21 A. That's what it looks like, yes. 01:50

22 Q. Okay. Which chamber were they put in? 01:50

23 A. It's not readily apparent. 01:50

24 Q. Okay. Does it matter which chamber they 01:51

25 put them in? 01:51

1 BY THE WITNESS: 01:58

2 A. They may if they went to university and 01:58  
3 had statistic class. 01:58

4 BY MR. KOPEL: 01:58

5 Q. Given that there were uncertainties of 01:58  
6 large numbers of new pests added in the middle of the 01:58  
7 test and you don't know what chamber they're added 01:58  
8 to, are you really comfortable relying on this test? 01:58

9 A. Yes. 01:58

10 MR. OSTOJIC: Asked and answered. 01:58

11 But go ahead. 01:58

12 BY THE WITNESS: 01:58

13 A. Yes again. 01:58

14 BY MR. KOPEL: 01:58

15 Q. Do you think that this would pass muster 01:58  
16 in peer review? 01:58

17 MR. OSTOJIC: Object to form. 01:58

18 But go ahead. 01:58

19 BY THE WITNESS: 01:58

20 A. It depends on the peers, it depends on 01:58  
21 the publication. 01:58

22 BY MR. KOPEL: 01:58

23 Q. Would you have relied on a test like this 01:58  
24 in the course of your work at Dow? 01:58

25 A. No. 01:58

1 Q. Why not? 01:58

2 A. Too many unanswered questions. 01:58

3 Q. So why are you more comfortable in the 01:58  
4 course of your work here relying on it? 01:58

5 A. Because the -- I -- because I've worked 01:59  
6 with Dow Chemical, I know the rigor with which they 01:59  
7 require their data to be obtained and used and 01:59  
8 analyzed. 01:59

9 I don't know the rigor from 01:59  
10 Bell + Howell case -- or the Bell + Howell culture. 01:59

11 Q. Was there a reason -- 01:59

12 A. They're different companies. 01:59

13 Q. Was there a reason that Dow Chemical had 01:59  
14 a heightened -- a very rigorous standard? 01:59

15 MR. OSTOJIC: Object to form. 01:59

16 Go ahead. 01:59

17 BY THE WITNESS: 01:59

18 A. Well, I didn't set the standard. I only 01:59  
19 complied with it. They wanted to reduce variability 01:59  
20 and be able to write labels and literature that was 01:59  
21 unquestionable. 01:59

22 BY MR. KOPEL: 01:59

23 Q. Do you agree that had the -- these new 01:59  
24 pests been added to Chamber B, that would skew the 02:00  
25 test results? 02:00

1           A.    Had they been -- yes, but the degree to       02:00  
2    which I don't know.   02:00

3           Q.    Well --   02:00

4           A.    Because the differences are highly           02:00  
5    significant for spiders and -- let's see -- ants       02:00  
6    under Point 1, Probably Point 1; for roaches, highly   02:00  
7    significant; and for the combination of all pests,       02:00  
8    highly significant differences in Chamber A and       02:00  
9    Chamber B.   02:00

10          Q.    But you haven't done the calculations to   02:00  
11   figure that out; have you?                               02:00

12          A.    I said that what I did was take the       02:00  
13   numbers as presented there. I did not take into       02:00  
14   account the quantity lost as they describe it.       02:00

15          Q.    Was that a mistake?                           02:01

16          A.    No.   02:01

17          Q.    Now, if you look at roaches, it looks       02:01  
18   like they added 12 roaches over the course of the       02:01  
19   test.   02:01

20                   Do you see that?                           02:01

21          A.    9 plus 3. Yes.                               02:01

22          Q.    And then they had 16 at the end of the       02:01  
23   test.   02:01

24                   Do you see that on Day 7?               02:01

25          A.    Had 16 roaches in Chamber B, yes, I see   02:01



1 Do you see that? 02:28

2 A. Yes. 02:28

3 Q. Okay. Did you do any research into the 02:28  
4 speaker size of this model? 02:28

5 A. Not speaker size, no. 02:28

6 Q. Did you do any research into whether this 02:28  
7 model produced static or frequency -- or variable 02:28  
8 outputs? 02:28

9 A. I read what Mankin said about it. 02:28

10 Q. Was this the same one he tested? 02:28

11 A. Yes. 02:28

12 Q. Given that it has variable outputs, 02:28  
13 you're still comfortable extend -- basing your 02:29  
14 opinion that even Bell + Howell repellers with static 02:29  
15 outputs are effective based on this test? 02:29

16 MR. OSTOJIC: Object to form. 02:29

17 BY THE WITNESS: 02:29

18 A. Yes. 02:29

19 BY MR. KOPEL: 02:29

20 Q. Okay. And this test was not replicated 02:29  
21 to your knowledge; was it? 02:29

22 A. Not in a true sense that's commonly used 02:29  
23 in science, no. 02:29

24 Q. And all the tests that we've reviewed so 02:29  
25 far have not been replicated; correct? 02:29

Page 172

1 A. Not in the true sense. 02:29

2 Q. Would you have relied on any of these 02:29

3 tests in the course of your work at Dow when 02:29

4 evaluating a product? 02:29

5 A. I would. 02:29

6 MR. OSTOJIC: Objection. Asked and answered. 02:29

7 But go ahead. 02:30

8 BY THE WITNESS: 02:30

9 A. I would consider them data. I don't 02:30

10 throw out data. 02:30

11 BY MR. KOPEL: 02:30

12 Q. Okay. But -- but you never relied on -- 02:30

13 take it back. 02:30

14 Okay. Can you please turn to 02:30

15 Page 2? 02:30

16 A. Yes. 02:30

17 Q. Okay. 02:30

18 A. It says here they used granulated sugar 02:30

19 as food. 02:30

20 Do you see that? 02:30

21 MR. OSTOJIC: Objection. You looking at the 02:30

22 picture? 02:30

23 THE WITNESS: Yeah, it -- 02:30

24 MR. KOPEL: I'm sorry. I meant Page 3. That 02:30

25 was my mistake. 02:30

1 Q. And it's possible they're in the chamber 02:34  
2 together at the same time that they were -- the -- 02:34  
3 the spiders, roaches, and ants were affecting each 02:34  
4 other's movements within the chambers; correct? 02:34  
5 MR. OSTOJIC: Object to form, foundation. 02:34  
6 BY THE WITNESS: 02:34  
7 A. It's possible, yes. We have no way of 02:34  
8 knowing. 02:34  
9 BY MR. KOPEL: 02:34  
10 Q. Well, spiders eat roaches; right? 02:34  
11 A. Yes. 02:34  
12 Q. So wouldn't you say it's pretty likely in 02:34  
13 that case that the spiders were affecting the 02:34  
14 movement of the roaches? 02:34  
15 A. No, I didn't say that -- 02:34  
16 MR. OSTOJIC: Objection to form and 02:34  
17 foundation. 02:34  
18 BY THE WITNESS: 02:34  
19 A. -- I said it's possible. 02:34  
20  
21 BY MR. KOPEL: 02:34  
22 Q. But you don't know one way or the other; 02:34  
23 right?  
24 A. I can't prove it one way or the other. 02:34  
25 Q. Do you know one way or the other? 02:34

Page 179

1 not clear. 02:52

2 Earlier we discussed, you know, that 02:52  
3 Dow had rigorous standards when evaluating efficacy 02:52  
4 of insecticides, that companies differ in terms of 02:52  
5 the standards required. 02:52

6 Do you recall that? 02:53

7 A. Yes, words to that effect. I don't know 02:53  
8 that I used the word standards, but, yes, I recall 02:53  
9 the conversation. 02:53

10 Q. Okay. In the course of your work at Dow, 02:53  
11 would you have relied upon the five -- solely upon 02:53  
12 the five studies we just examined, that is the five 02:53  
13 Chinese studies of the Bell + Howell repellers in 02:53  
14 determining that a product was effective? 02:53

15 You know what. Let me restate the 02:53  
16 question, okay? 02:53

17 In the course of your work at Dow, 02:53  
18 would you have relied on the five Chinese studies 02:53  
19 that we just discussed in making a determination that 02:53  
20 the product would be effective inside people's 02:53  
21 residences? 02:53

22 MR. OSTOJIC: Object to form, foundation. 02:53

23 To the extent you can answer, go 02:54  
24 ahead. 02:54  
25

1 BY THE WITNESS: 02:54

2 A. I would not have relied on those studies 02:54  
3 solely to fulfill my obligation to Dow. 02:54

4 BY MR. KOPEL: 02:54

5 Q. Why not? 02:54

6 A. Because they are -- well, for the reasons 02:54  
7 we pointed out. They weren't -- they could have been 02:54  
8 done better. They could have been -- or else you 02:54  
9 have to have other tests that are done, replicated, 02:54  
10 there's a control, the species. 02:54

11 I mean for Dow's purposes, this -- I 02:54  
12 would not use these data to make a commercialization 02:54  
13 decision on, but I wouldn't discount them either. 02:54

14 I've said that, and I want to make 02:55  
15 sure you understand that. I don't throw data out. 02:55

16 So sole -- the -- solely, no. In 02:55  
17 combination with other things, as many other things 02:55  
18 that I can find, they're part of the package. 02:55

19 Q. Would the totality of the data you've 02:55  
20 seen on the effectiveness of the Bell + Howell 02:55  
21 repellants, would the totality of that data have been 02:55  
22 sufficient for you to commercialize this product for 02:55  
23 use in residences with Dow? 02:55

24 MR. OSTOJIC: Object to form, foundation, and 02:55  
25 irrelevant. 02:55

Page 181

1 But go ahead. 02:55

2 BY THE WITNESS: 02:55

3 A. Well, it's difficult to say because 02:55

4 different -- as I said before, business people are 02:55

5 involved in the decisionmaking at Dow. 02:55

6 If the business leaders saw the data 02:55

7 and agreed that it was sufficient to back up the 02:56

8 claims on the labels, they might have. 02:56

9 Q. Was it -- and, as I understood it, it was 02:56

10 your job to make -- to make these determinations; was 02:56

11 it not? 02:56

12 A. That was one of many. 02:56

13 Q. Okay. 02:56

14 A. But my -- my opinion carried a lot of 02:56

15 weight. 02:56

16 Q. Okay. As to your own purposes, would you 02:56

17 have relied on the totality of the data you've seen 02:56

18 on Bell + Howell repellers to go forward with the 02:56

19 commercialization of the product at Dow? 02:56

20 MR. OSTOJIC: Object. Same objections as 02:56

21 before. 02:56

22 THE WITNESS: As a Dow -- all right. I have 02:56

23 to ask you to read it back because I think you said 02:56

24 at the end as a Dow employee, so that's -- 02:56

25 MR. KOPEL: I believe that's what I -- 02:56

1	THE WITNESS: -- different. Not a	02:56
2	Bell + Howell employee, a Dow employee.	02:56
3	MR. KOPEL: I believe that's what I said, but	02:56
4	let's --	02:56
5	THE WITNESS: Okay.	
6	MR. KOPEL: Let's let the court reporter read	02:56
7	it back, please.	02:56
8	(WHEREUPON, the record was	02:57
9	read by the reporter.)	02:57
10	MR. OSTOJIC: Same objections.	02:57
11	BY THE WITNESS:	02:57
12	A. All right. For my own purposes, what do	02:57
13	you mean by that?	02:57
14	BY MR. KOPEL:	02:57
15	Q. Sure. I mean in the course of your	02:57
16	professional obligations at Dow.	02:57
17	A. Okay.	02:57
18	No.	02:57
19	Q. Can you please turn to your initial	02:57
20	report at Page 8?	02:57
21	A. Okay.	02:57
22	Q. I'm looking at Opinion 5 and the first	02:58
23	sentence.	02:58
24	A. Oh, sorry. I'm on the wrong one again.	02:58
25	I pulled the rebuttal.	02:58

Page 200

1 that. 03:35

2 Okay. So do you see here in Table 4 03:35

3 on Page 1029 that Dr. Koehler did not count the 03:35

4 cockroaches found in the corridor as being in the 03:35

5 untreated room, he counted them separately? 03:35

6 Do you see that? 03:35

7 A. I do. 03:35

8 Q. Okay. And -- and you were saying in your 03:35

9 rebuttal report that it's more appropriate to count a 03:35

10 corridor as being repelled. 03:35

11 Do you remember that? 03:35

12 A. Well, if you're limiting your categories 03:35

13 to two, yes. There's always the possibility to add a 03:35

14 third as Dr. Koehler did, corridor or tunnel or 03:35

15 connecting to, and that would have been even better 03:35

16 in my opinion had the researchers done that. 03:35

17 Q. So what is it that you think they did 03:35

18 incorrectly? 03:36

19 A. I didn't say incorrect. I just said 03:36

20 would have been more informative -- 03:36

21 Q. Oh, okay. 03:36

22 A. -- if they had created a third category 03:36

23 called -- like Koehler did -- corridor or connecting 03:36

24 to, number found in connecting to. 03:36

25 Q. Okay. And when you say the researchers, 03:36



1 are you referring to i2L? 03:36

2 A. Yes. 03:36

3 Q. Okay. Now, wouldn't it be very easy to 03:36

4 deduce how many were in the tube if you just took 03:36

5 them out that were in the treated portion and 03:36

6 untreated portion and then you saw how many were 03:36

7 missing? Wouldn't you then be able to deduce how 03:36

8 many were in the connecting tube? 03:36

9 A. By arithmetic you should be able to do 03:36

10 that. 03:36

11 Q. So you have that information regardless; 03:36

12 isn't that right?

13 A. You could find -- you could develop that 03:36

14 information. 03:36

15 Q. In any event, Dr. Koehler did not count 03:36

16 the corridor as being repelled; correct? 03:36

17 A. He treated it as a third category, 03:36

18 just... 03:37

19 Q. So that's a yes, he did not count it as 03:37

20 being repelled; correct? 03:37

21 A. He didn't say as such, no. 03:37

22 Q. And this is a peer-reviewed article; 03:37

23 correct? 03:37

24 A. Yes. 03:37

25 Q. Okay. So the scientists who reviewed 03:37

Page 247

1 BY MR. KOPEL: 05:23

2 Q. This issue which you perceive as a 05:23

3 deficiency survived scrutiny during the peer review 05:23

4 process; correct? 05:23

5 MR. OSTOJIC: Same objection. 05:23

6 BY THE WITNESS: 05:24

7 A. Yes. 05:24

8 BY MR. KOPEL: 05:24

9 Q. Can you please turn to Page 64? 05:24

10 A. Okay. 05:24

11 Q. Okay. And I'm looking at the right-hand 05:24

12 column, and there's a sentence starting with the 05:24

13 words, "The remaining." 05:24

14 Do you see that? 05:24

15 A. Yes. 05:24

16 Q. It says, "The remaining cockroaches that 05:24

17 were unaccounted for (not visible) were in the 05:24

18 conduits connecting the enclosures." 05:24

19 Do you see that? 05:24

20 A. I do. 05:24

21 Q. Okay. So do you understand, based on 05:24

22 this, that the insects found in the corridors were 05:24

23 not counted as repelled in this study? 05:24

24 A. Based on that sentence, that's what I 05:24

25 would assume. I -- I did not go through the -- all 05:24

1 the arithmetic to account for it, but that sentence 05:24  
2 leads me to believe that. 05:24

3 Q. And that aspect of the protocol also was 05:24  
4 necessarily approved through the scrutiny of the peer 05:25  
5 review process; correct? 05:25

6 MR. OSTOJIC: Same objections. 05:25

7 BY THE WITNESS: 05:25

8 A. Yes, I would have disapproved it, but I 05:25  
9 wasn't on the editorial board. 05:25

10 BY MR. KOPEL: 05:25

11 Q. So we've now seen two peer-reviewed 05:25  
12 publications in which the connecting tube was not 05:25  
13 counted as repelled; correct? 05:25

14 A. Yes. 05:25

15 Q. Can you please take a look at Page 65? 05:25

16 A. Okay. 05:26

17 Q. And I'm looking at the discussion 05:26  
18 portion, the last sentence where the authors conclude 05:26  
19 that results from Ballard, et al. in 1984 indicate 05:26  
20 that the device could not repel the German cockroach 05:26  
21 as sufficiently as an effective best management tool. 05:26

22 Do you see that? 05:26

23 A. I see it. 05:26

24 Q. Okay. And that's the same conclusion 05:26  
25 that Dr. Potter reached based on that study; correct? 05:26

Page 253

1 chambers." 05:33

2 Do you see that? 05:33

3 A. "The unaccounted cockroaches were 05:33

4 found" -- yes, I see that. 05:33

5 Q. So do you understand, based on this, that 05:33

6 in this test the cockroaches found in the conduits 05:33

7 connecting the chambers were not counted as repelled? 05:33

8 A. That's what they said, yes. 05:33

9 Q. Okay. And that point passed scrutiny of 05:33

10 peer review; right? 05:33

11 MR. OSTOJIC: Object to form, foundation. 05:33

12 BY THE WITNESS: 05:33

13 A. Because the peer review panel did not 05:33

14 include me. 05:33

15 BY MR. KOPEL: 05:33

16 Q. Now, we've looked at several articles 05:33

17 where they counted the conduit. They did not count 05:33

18 the con -- let me rephrase. 05:33

19 We've now looked at several peer- 05:33

20 reviewed articles in which insects found in the 05:34

21 conduit were not labeled as repelled; correct? 05:34

22 A. Yes. 05:34

23 Q. Okay. Sitting here today can you name a 05:34

24 single publication in which the insects found in the 05:34

25 conduit were counted as repelled? 05:34

1           A.    Do you consider my report to be a           05:34  
2           publication?           05:34

3           Q.    Other than your report, please.           05:34

4           A.    I can't answer -- I can't ask you           05:34  
5           questions. Sorry.           05:34

6                    I can't today, you know, without           05:34  
7           doing a full literature search, describe or enumerate   05:34  
8           any publication that counted.           05:34

9           Q.    Having reviewed these publications, would   05:34  
10          you agree that it's generally accepted in the field   05:34  
11          as an acceptable practice to not label insects found   05:34  
12          in the conduit as repelled?           05:35

13          MR. OSTOJIC: Object to form, foundation as           05:35  
14          to these publications, and also may call for           05:35  
15          speculation.           05:35

16                   But go ahead.           05:35

17          BY THE WITNESS:           05:35

18          A.    In these publications that we reviewed           05:35  
19          today, it appears that way.           05:35

20          BY MR. KOPEL:           05:35

21          Q.    Would you say that based on reviewing           05:35  
22          several peer-reviewed publications that did this       05:35  
23          practice, that it is a generally acceptable practice   05:35  
24          in the field to do it that way?           05:35

25          A.    Well --           05:35

1                   It's not that it was an invalid                   05:50  
2       test, it had the wrong objective as -- as it relates       05:50  
3       to this case in your opinion; correct?                   05:51

4                   MR. OSTOJIC:   Same objection.                   05:51

5                   But go ahead.                   05:51

6       BY THE WITNESS:                   05:51

7                   A.    In addition, the harborages protected the       05:51  
8       insects from the ultrasound.                   05:51

9                   As soon as they stick their little           05:51  
10       head outside of that harborage, it's likely that they   05:51  
11       were going to be exposed to the ultrasonic.           05:51

12                   So you -- so the fact that the           05:51  
13       insects did not move in Dr. Potter's test does not       05:51  
14       surprise me, it's what I wrote in my report, because   05:51  
15       they were protected.                   05:51

16       BY MR. KOPEL:                   05:51

17                   Q.    Where do insects typically nest inside of       05:51  
18       the house?                   05:51

19                   MR. OSTOJIC:   Object to form, foundation.       05:51

20       BY THE WITNESS:                   05:51

21                   A.    Any place that suits their requirements.   05:51

22       BY MR. KOPEL:                   05:51

23                   Q.    And what's that?                   05:51

24                   A.    Usually -- I mean I -- I would -- I would   05:51  
25       list -- put a list together.   It would be safety,       05:51

1       they need food, they need water, and they are born to       05:51  
2       breed.       05:51

3               Q.     What do you mean by safety?       05:51

4               A.     Oh, they feel protected.       05:52

5               Q.     So they prefer -- they prefer to nest in       05:52  
6       a place with harborage; correct?       05:52

7               A.     Well, cockroaches and ants do, which are       05:52  
8       the case here.       05:52

9               Q.     And those are areas where the -- the       05:52  
10       Bell + Howell repellers cannot reach; correct?       05:52

11              A.     Ultrasound cannot reach them. Clearly       05:52  
12       stated on the product literature.       05:52

13              Q.     Okay. Let's talk about the pheromones,       05:52  
14       please.       05:52

15                     And I -- I suspect that the issue       05:52  
16       here is similar to the last one.       05:52

17                     Would you agree that in a -- in a       05:52  
18       residence that has an insect infestation that the       05:52  
19       insects would have left pheromones in that house?       05:52

20              MR. OSTOJIC: Object to form, but go ahead.       05:52

21       BY THE WITNESS:       05:52

22              A.     Yes.       05:52

23       BY MR. KOPEL:       05:52

24              Q.     Okay. So in that respect would you agree       05:52  
25       that the i2L testing was emulative of real-world       05:52

1 BY THE WITNESS: 05:58

2 A. It's not -- I -- the answer -- the short 05:58  
3 answer to your question is -- is yes. 05:58

4 But -- but, again, to go back to 05:58  
5 the -- the claims on the label of this repeller don't 05:58  
6 require that you have harborages or sofas or chairs 05:59  
7 or walls. 05:59

8 BY MR. KOPEL: 05:59

9 Q. So even if the repellers don't work in an 05:59  
10 environment where you have all the furniture you just 05:59  
11 mentioned, the claims would still be correct because 05:59  
12 the packaging does not mention those items; is that 05:59  
13 what you're saying? 05:59

14 A. That's -- 05:59

15 MR. OSTOJIC: Object to form, foundation, 05:59  
16 incomplete hypothetical, misstates the evidence. 05:59

17 But go ahead. 05:59

18 BY THE WITNESS: 05:59

19 A. That's what I'm saying. 05:59

20 BY MR. KOPEL: 05:59

21 Q. Can we talk about the starvation concept 05:59  
22 that you're talking about on Page 8 here. 05:59

23 Is it your contention that the 05:59  
24 repellers would be less likely to have a repellent 06:00  
25 effect if insects are satiated? 06:00



1 BY THE WITNESS: 06:47

2 A. I -- I -- indirectly, yes. 06:47

3 Indirectly with the Amazon review 06:47

4 that I did before, that I talked about before. 06:47

5 BY MR. KOPEL: 06:47

6 Q. Okay. But did the Amazon reviews say 06:47

7 what the consumers thought the claims meant? 06:47

8 A. No, they do not -- I don't know whether 06:47

9 they say it or not. They're taking their whole 06:47

10 experience and lumping it into a one of five star 06:47

11 rating. 06:47

12 And their experiences have to 06:47

13 include that they got a package that had these kind 06:47

14 of words on it, and they got a user manual that said 06:47

15 this. 06:47

16 Q. Did you ask -- ever ask a single consumer 06:47

17 how they understood these claims? 06:47

18 A. No. 06:47

19 Q. What if I told you that the Amazon rating 06:47

20 for this product is below average, would that change 06:48

21 your opinion? 06:48

22 A. You already asked that question, and I 06:48

23 said I would -- I would certainly -- 06:48

24 Q. I think I -- I think I -- you might have 06:48

25 misunderstood what I was saying. I'm sorry to cut 06:48

Page 309

1 BY MR. KOPEL: 06:49

2 Q. Have you seen any evidence that the 06:49

3 ultrasonic waves emitted by the Bell + Howell 06:49

4 repellers are capable of reaching pest in a room that 06:49

5 contains furniture? 06:49

6 MR. OSTOJIC: Objection. Asked and answered 06:49

7 and may call -- and foundation. 06:49

8 Also incomplete hypothetical to type 06:49

9 of furniture, where it's located. 06:49

10 Go ahead. 06:49

11 MR. KOPEL: That's called witness coaching. 06:49

12 Please stop that. 06:50

13 BY THE WITNESS: 06:50

14 A. I've not seen Bell + Howell -- 06:50

15 Bell + Howell devices tested in rooms that have 06:50

16 furniture or carpeting. Though it still doesn't 06:50

17 change my opinion. 06:50

18 BY MR. KOPEL: 06:50

19 Q. Do you believe that if submitted for 06:50

20 publication in a peer-reviewed journal, the Chinese 06:50

21 studies conducted on the Bell + Howell repellers 06:50

22 would be potentially selected for publication? 06:50

23 MR. OSTOJIC: Objection. Asked and answered 06:50

24 like two to three hours ago. 06:50

25 Common, we got to move on to other 06:50

Page 310

1 things. We're just repeating the same questions. 06:50

2 But go ahead and answer it again. 06:50

3 BY THE WITNESS: 06:50

4 A. No, that wasn't the purpose of their 06:50

5 studies. Feuerstein said that. It did not want to 06:50

6 publish. 06:50

7 MR. KOPEL: All right. I have no further 06:50

8 questions. 06:50

9 MR. OSTOJIC: We're going to reserve 06:50

10 signature. 06:50

11 THE VIDEOGRAPHER: The time it now 6:53 p.m. 06:51

12 This is the end of Media No. 5. This concludes this 06:51

13 deposition.

14 We're off the record. 06:51

15 MS. REPORTER: Are you ordering the 06:51

16 transcript at this time? 06:51

17 MR. KOPEL: Not at this time. 06:51

18 Do you know pricing? Can I look at 06:51

19 pricing? I'm going to have my office contact 06:51

20 Veritext in regards to ordering. 06:51

21 MS. REPORTER: Would you like a copy if it's

22 ordered? 06:51

23 MR. OSTOJIC: I will not need one now; but 06:51

24 obviously if the plaintiff orders one, please contact 06:51

me, I will probably get a copy. 06:51

25 (Whereupon, at 6:53 p.m. the deposition was concluded.)